No. 79-1123

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CLARENCE NEVILLE,

Petitioner,

vs.

C. JOSEPH CAVANAGH, STATE'S ATTORNEY, SANGAMON COUNTY, SPRINGFIELD, ILLINOIS, and GEORGE A. RALSTON, WARDEN, UNITED STATES PENITENTIARY, TERRE HAUTE, INDIANA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT C. JOSEPH CAVANAGH IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondents submit that petitioner has failed to show any reason for this Court to exercise its sound judicial discretion to grant this Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

WHETHER THE SEVENTH CIRCUIT DECISION BELOW CONFLICTS WITH ANY DECISIONS OF THE UNITED STATES SUPREME COURT.

STATEMENT OF THE CASE

Petitioner was serving a 10 year sentence in the federal penitentiary at Terre Haute, Indiana when the State's Attorney of Sangamon County, Illinois filed a detainer against him pursuant to the Interstate Agreement on Detainers Act, Ill.Rev.Stat., 1975, ch. 38, § 1003-8-9. The detainer was based on 28 indictments that were pending against petitioner in the Sangamon County Circuit court. Petitioner was transferred to the Sangamon County Jail on June 6, 1976. His trial was scheduled for October 25, 1976, but one week prior to trial, petitioner's privately retained counsel requested a continuance due to counsel's illness. The court granted a continuance until January, 1977, with a specific trial date to be set later. The court also entered an order directing that petitioner be returned to federal custody. Shortly thereafter, the petitioner was transferred back to the federal penitentiary in Terre Haute.

In January, 1977 petitioner filed a pre-trial motion to dismiss in Sangamon County Court, asserting that Article IV(e) of the Interstate Agreement on Detainers Act required dismissal of the pending indictments. The trial court denied this motion.

Petitioner then filed a petition in the Illinois Supreme Court requesting permanent prohibition of the trial and dismissal of the indictments with prejudice. The Illinois Supreme Court ruled against petitioner on the merits of the claim and his petition for a writ of prohibition was denied. The court considered the fact that petitioner had sought the continuance which resulted in the lengthy trial delay, that the state had been prepared to go to trial and that the petitioner had not objected to being returned to Terre Haute. The Court held that under these circumstances the Interstate Agreement on Detainers Act did not require dismissal of the charges.

Petitioner sought review of the Illinois Supreme Court's ruling in the United States Supreme Court, but certiorari was denied.

Subsequently, petitioner filed a petition for a writ of habeas corpus and an application for a temporary restraining order in the United States District Court for the Southern District of Illinois. The District Court held that the pre-trial application for habeas corpus relief was premature. Both habeas corpus and injunctive relief were denied and petitioner appealed to the Seventh Circuit Court of Appeals.

While the appeal was pending, petitioner was paroled from the federal penitentiary in Terre Haute, Indiana. The State of Illinois initiated extradition proceedings against petitioner and issued fugitive warrants against him. Petitioner was transferred to the custody of the sheriff of Vigo County, Indiana. He was arraigned on the warrants, but he refused to waive extradition. He was also granted bail on the condition that he remained in Indiana.

The Seventh Circuit Court of Appeals affirmed the judgment of the district court. The Court emphasized the fact that unlike the petitioner in *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973), petitioner herein sought to derail a pending state criminal proceeding.

The petitioner then filed the instant Petition for a Writ of Certiorari.

REASON FOR DENYING THE WRIT OF CERTIORARI

THE SEVENTH CIRCUIT DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner argues that he is entitled to a Writ of Certiorari because the dismissal of his habeas corpus petition is in conflict with the decisions in *Abney* v. *United States,* 431 U.S. 651 (1977) and *Harris* v. *Washington,* 404 U.S. 55 (1971). The petitioner is clearly in error.

Both *Abney* and *Harris* dealt with double jeopardy claims. In *Abney* this Court held that the pre-trial rejection of a defendant's double jeopardy claim was collateral to and separate from the issue of guilt and therefore it was immediately appealable. In *Harris* the Court held that a second criminal trial was barred where the defendant had been acquitted in a previous trial involving the same ultimate factual issue. Unlike the defendant's in *Abney* and *Harris,* the petitioner herein is claiming that the state court lost jurisdiction to try him pursuant to the Interstate Agreement on Detainers Act, Ill.Rev.Stat. 1975, ch. 38, 1003-8-9.[1]

The Seventh Circuit below recognized the distinction between claims arising under the Double Jeopardy Clause and those arising under the Interstate Agreement on Detainers Act. Quoting from *Moore* v. *DeYoung,* 515 F.2d 437, 466 n.11 (3rd Cir. 1975), the court noted:

> One major substantive difference in the nature of the two claims . . . is readily apparent. A double jeopardy claimant has once endured the rigors of a criminal trial. [The petitioner], by contrast, has not yet stood trial on any of the indictments arising out of the alleged criminal assault. Thus, the constitutional and policy considerations, which may entitle a defendant claiming double jeopardy to have that claim considered in a pretrial federal habeas petition before state court exhaustion of that issue on the merits do not apply with equal force to [the petitioner's Interstate Agreement on Detainers Act] contention.

611 F.2d 673, 676 n.5.

[1] The instant petition refers to the alleged violation of a federal right under 18 U.S.C. Appendix, Article IV(e), although petitioner was transferred to the Sangamon County Jail pursuant to Ill. Rev. Stat. 1975, ch 38, § 1003-8-9. Regardless, a federal right under 28 U.S.C. 2241(c)(3) was involved in this case because "[t]he construction of [an interstate] compact sanctioned by Congress . . . presents a federal question" *Neville* v. *Cavanagh,* 611 F.2d 673, 675 n. 5 citing *Echevarria* v. *Bell,* 579 F.2d 1022, 1024 (7th Cir 1978).

The Fifth Circuit made a similar distinction in *Tooten* v. *Shevin,* 493 F.2d 173 (1974) *cert. denied,* 421 U.S. 966 (1975) between the appellant's assertion of a federal defense to a state prosecution and one who asserted a double jeopardy claim. *Id.* at 176.

Petitioner's attempt to analogize his interpretation of the Interstate Agreement on Detainers Act to double jeopardy cases is thus contrary to decisions of the Third, Seventh and Fifth Appellate Circuits. Furthermore, petitioner has submitted no authority from other circuits and respondent has found no cases that support petitioner's theory that the pre-trial assertion of an alleged violation of a federal right in state court is analogous to a double jeopardy claim.

The Seventh Circuit's decision below is also consistent with the pre-trial habeas case, *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). Unlike the petitioner herein, the petitioner in *Braden* sought only to demand enforcement of the state's affirmative constitutional obligation to bring him promptly to trial. Petitioner, on the other hand, is seeking to prevent trial on the state charges with his claim that the state court lost jurisdiction pursuant to the Interstate Agreement on Detainers Act. The significance of this factual distinction was stressed in *Braden:*

> "[P]etitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum.
>
> * * *
>
> We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defense prematurely in federal court.

410 U.S. at 491, 493.

Since petitioner is seeking to derail a pending state proceeding, the Seventh Circuit's decision to deny habeas corpus review was consistent with this Court's analysis in Braden, *Id.*

Jurisdiction to review the judgments of the circuit court of appeals by certiorari is to be exercised sparingly and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision. *Hamilton-Brown Shoe Company* v. *Wolf Brothers and Company,* 240 U.S. 251, 257, 258 (1915). Since petitioner has not substantiated his conclusion that the Seventh Circuit Appellate Court's decision is in conflict with decisions of this Court, he has failed to present a tenable basis for certiorari review.

CONCLUSION

For the foregoing reasons, respondent Cavanagh prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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